

1 KAREN A. OVERSTREET
United States Bankruptcy Judge
2 United States Courthouse
700 Stewart St., Suite 6310
3 Seattle, WA 98101
206-370-5330
4

5 UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
6 AT SEATTLE

7 In re)
8 ROSEMARY H. KAMB,) Chapter 7
9 Debtor.) Bankruptcy No. 11-13856
10 _____)
11 ESTATE OF LYDE L. HERRLE,) Adversary No. 11-01380
12 Plaintiff,)
13 v.) **MEMORANDUM DECISION**
14 ROSEMARY H. KAMB,) (Not for Publication)
Defendant.)
15 _____)

16 The trial in this matter commenced on August 31, 2011. The
17 Plaintiff, Estate of Lyde L. Herrle, ("Estate" or "Plaintiff") and
18 Defendant, Rosemary H. Kamb, ("Ms. Kamb" or "Defendant") appeared
19 through counsel. This Memorandum Decision contains the Court's
20 findings of fact and conclusions of law for purposes of Bankruptcy
21 Rule 7052.¹ Jurisdiction of this matter is proper under 28 U.S.C.
22 §§ 157 and 1334 and this is a core proceeding under 28 U.S.C. §
23 157(b)(2)(I).
24
25

26 ¹ Unless otherwise indicated, all Code, Chapter, Section and
27 Rule references are to the Bankruptcy Code, 11 U.S.C. §§101 *et seq.*
28 and to the Federal Rules of Bankruptcy Procedure, Rules 1001 *et seq.*

1 Having considered the evidence, the Court finds in favor of
2 the Defendant and any obligation she owes to Plaintiff should be
3 discharged.

4 I. BACKGROUND

5 Plaintiff brings this matter under Sections 523(a)(4) and
6 (a)(6) to except from discharge a debt in the amount of
7 approximately \$350,000 arising from a loan made by Plaintiff to
8 Ms. Kamb. The Court denied Plaintiff's Motion for Summary Judgment
9 on the Section 523(a)(4) claim, concluding that there was a dispute
10 of fact as to whether, at the time the loan was made, Ms. Kamb was
11 acting as a fiduciary for the Estate. Plaintiff contended that at
12 the time, Ms. Kamb was acting as the attorney for the Estate. The
13 issues for trial were (1) whether Ms. Kamb was acting as a
14 fiduciary for the Estate at the time the debt was incurred for
15 purposes of Section 523(a)(4), and (2) whether the debt should be
16 excepted from discharge under Section 523(a)(6).

17 II. FINDINGS OF FACT

18 Ms. Kamb is a lawyer who represented Lyde L. Herrle in estate
19 planning matters. On August 6, 2008, Lyde Herrle executed a will
20 (the "2008 Will") and complete amendment to the Lyde Herrle Trust
21 (the "Trust"). Both documents were drafted by Ms. Kamb. The 2008
22 Will named Marie Kunferman, Lyde Herrle's then 93 year-old sister,
23 as the personal representative. It further provided that any
24 assets in Mr. Herrle's estate would pour over into the Trust.
25 Plaintiff's Exhibit 1 (hereinafter "Pl. Ex.") The Trust named
26 Ms. Kunferman as the trustee and the Immaculate Conception Church,
27 Immaculate Conception School, and ICRS Scholarship Program as the
28 primary beneficiaries. Pl. Ex. 2, page 14. The Trust also

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1 contained some special bequests, including a direction that
2 Mr. Herrle's house and farm be distributed to his niece, Connie
3 Marich. Ms. Kamb drafted another amendment to the Trust in 2008
4 which expressed Mr. Herrle's intent that none of the Trust assets
5 be used by Immaculate Conception Church to build a new church. Pl.
6 Ex. 3.

7 On January 2, 2010, Mr. Herrle executed another will drafted
8 by Ms. Kamb (the "2010 Will"), which was much like the 2008 Will,
9 in that it named Ms. Kunferman as the personal representative and
10 provided that any assets in Mr. Herrle's estate would pour over
11 into the Trust. Pl. Ex. 5. At the same time, Mr. Herrle also
12 executed a second amendment to the Trust (the "Second Amendment")
13 which was also drafted by Ms. Kamb. The Second Amendment clarified
14 that the Immaculate Conception (Regional) School Endowment or
15 Foundation and scholarship program for Immaculate Conception
16 (Regional) School tuition were the primary beneficiaries. Pl. Ex.
17 6, pages 2-3.

18 On February 6, 2010, Mr. Herrle executed a third amendment to
19 his Trust (the "Third Amendment") drafted by Mr. Kamb. Under the
20 Third Amendment, Ms. Kamb was named the trustee under the Trust,
21 replacing Ms. Kunferman. Pl. Ex. 8, page 1. The Third Amendment
22 recites the reason for the change, stating that:

23 I [Lyde Herrle] do not want Marie
24 [Ms. Kunferman] to be put in the middle of my
25 affairs. I do not like what this business has
done to make her worry. That is why I asked
Rosemary Kamb to be in charge.

26 Pl. Ex. 8, page 3. The Third Amendment was witnessed by Ms. Kamb's
27 mother, Wilma Kamb, and by Ms. Kamb's brother, Michael Kamb, and
28 notarized by Ms. Kamb.

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1 Additionally, the Third Amendment removed the distribution of
2 Mr. Herrle's house and farm to his niece, Connie Marich. Instead,
3 the Third Amendment recites that Mr. Herrle's relationship with
4 Mrs. Marich's husband had become strained and that Mr. Herrle had
5 decided to sell his house and farm to Robert Jungquist and retain a
6 life estate in the property. Pl. Ex. 8, page 3. Ms. Kamb
7 testified that at the time she prepared the Third Amendment, she
8 was the attorney for Mr. Herrle, the Estate and the Trust, and for
9 Ms. Kunferman as to her personal matters.

10 On February 23, 2010, Lyde Herrle passed away.

11 By order dated March 2, 2010 (the "Suspension Order"), the
12 Washington Supreme Court suspended Ms. Kamb from the practice of
13 law for a period of one year commencing on March 9, 2010. Pl. Ex.
14 10. The Suspension Order approved a stipulation entered into
15 between Ms. Kamb and the disciplinary counsel of the Washington
16 State Bar Association on November 10, 2009, pursuant to which
17 Ms. Kamb had agreed to a one-year suspension. Thus, she knew in
18 late 2009 that if the stipulation was ultimately approved by the
19 Washington Supreme Court, she likely would be subject to at least a
20 one-year suspension. Pl. Ex. 4 at ¶55. At no time prior to March
21 9, 2010, did Ms. Kamb notify Mr. Herrle or Ms. Kunferman orally or
22 in writing of her likely suspension.

23 Following her suspension, Ms. Kamb drafted a Notification and
24 Acknowledgment letter for Marie Kunferman to sign (the
25 "Acknowledgment"). Defendant's Exhibit 102 (hereinafter "Def.
26 Ex."). The Acknowledgment states that Ms. Kamb would not be able
27 to act in any professional capacity as an attorney and that if the
28 Trust and/or Estate had the need to hire an attorney, Ms. Kamb

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1 could not be that attorney. The Acknowledgment further states that
2 Ms. Kamb has Ms. Kunferman's permission to act as trustee of the
3 Trust in her individual capacity, "but not as an attorney." *Id.*
4 The Acknowledgment is dated March 11, 2010, and although it is not
5 witnessed or notarized, Ms. Kunferman testified that her signature
6 appears on the document. Ms. Kunferman, who was 96 at the time of
7 trial, could not remember the circumstances under which she signed
8 the Acknowledgment nor could she say that she understood what it
9 meant. The Acknowledgment does not refer to the suspension nor was
10 there any evidence that Ms. Kamb ever advised Ms. Kunferman orally
11 or in writing of the suspension after it became effective.

12 A week before the date of the Acknowledgment, Ms. Kunferman
13 signed Record and Information Release Authorization letters, as
14 successor trustee under the Trust and as personal representative of
15 the Estate, authorizing various entities, including without
16 limitation, Bank of America and Sun Life Financial, to deal
17 directly with Ms. Kamb, the "Trustee of the Lyde L. Herrle [sic],"
18 and giving Ms. Kamb, or any authorized person, permission to access
19 any and all financial information, such as estate planning
20 documentation, financial records, and investment and retirement
21 documentation, pertaining to Mr. Herrle. See Pl. Exs. 30-35.

22 Ms. Kamb testified that in March of 2010, on account of a
23 "hate crime" affecting her residence, she decided she needed to
24 move from her residence. On March 29, 2010, she signed a purchase
25 and sale agreement with Janice Otto to purchase property located at
26 17269 Lake View Boulevard, Mt. Vernon, Washington (the "Lakeview
27 Property") for a purchase price of \$350,000. Pl. Ex. 53. Although
28 Ms. Kamb testified that she believed the agreement had a financing

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1 contingency clause, the agreement does not contain such a clause.

2 *Id.* The agreement provided for a closing date of May 31, 2010.

3 On March 31, 2010, two days after Ms. Kamb committed herself
4 to purchase the Lake View Property, Ms. Kamb left on a boat cruise
5 with Ms. Kunferman, Ms. Kamb's sister, Elizabeth Mitchell,
6 Ms. Kamb's son, and Ms. Kamb's parents. They did not return from
7 the cruise until April 10, 2010. Def. Ex. 124. The day after they
8 left, however, papers arrived at the Superior Court for Skagit
9 County which were intended to, and did, commence the probate of
10 Mr. Herrle's estate. The papers consisted of a Petition for
11 Probate of Will (the 2008 Will) and an Oath of Executor. Pl. Ex.
12 11. Both documents were signed by Ms. Kunferman, as personal
13 representative, and notarized by Kimberly Buchanan on March 29,
14 2010. Ms. Kamb and Ms. Kunferman denied that either of them filed
15 the probate documents with the Superior Court. There was, however,
16 a letter to the Court Clerk for Skagit County submitted with the
17 probate documents, which enclosed a check for \$256.00 from
18 Ms. Kunferman. Pl. Ex. 55. Ms. Kamb further testified that she
19 did not know who Ms. Buchanan was, and that she had never used
20 Ms. Buchanan as a notary. The Superior Court issued Letters
21 Testamentary to Ms. Kunferman on April 5, 2010. Pl. Ex. 27.

22 On April 12, 2010, Lawrence Pirkle, attorney for Kenneth
23 Jungquist, sent a letter to Ms. Kamb which enclosed a revised
24 Purchase and Sale Agreement concerning the sale of Mr. Herrle's
25 property. Pl. Ex. 13. Mr. Pirkle testified at trial that he had
26 engaged in discussions with Ms. Kamb regarding the sale of this
27 property before and after Mr. Herrle died. He testified that he
28 had a conversation with Ms. Kamb on or about April 8, 2010,

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1 discussing closing matters for the sale of this property, and that
2 Ms. Kamb communicated to Mr. Pirkle that she would have to discuss
3 these matters with her client, which Mr. Pirkle believed was
4 Ms. Kunferman. Ms. Kamb denied this conversation and testified
5 that on April 8, she was still on the cruise with Ms. Kunferman.

6 Four days after returning from the cruise, Ms. Kunferman, as
7 personal representative of the Estate, signed the agreement for the
8 sale of Mr. Herrle's house and farm to Kenneth Jungquist, Robert
9 Jungquist's son, for a purchase price of \$355,000. Pl. Ex. 40.
10 She initialed two changes to the agreement: (1) changing the
11 closing date to April 30, 2010, and (2) changing the date for a
12 change of possession of the house to 60 days after closing. The
13 sale closed on or about April 20, 2010.

14 On April 26, 2010, Ms. Kamb signed a resignation as the
15 trustee for the Trust, which purports to give all powers to the
16 successor trustee, Ms. Kunferman. Def. Ex. 101. The resignation
17 was notarized by Jessica Arnold that same day, but it was not filed
18 with the trust records. See RCW 11.98.029, 11.98.041.

19 In the March and April 2010 time frame, Ms. Kamb
20 unsuccessfully sought financing to complete her purchase of the
21 Lake View Property. Ms. Kamb testified that during this same time
22 frame, she and Ms. Kunferman agreed that Ms. Kunferman would loan
23 the Estate's proceeds from the sale of Mr. Herrle's house and farm
24 to Ms. Kamb subject to a long term pay back at 5% interest so that
25 Ms. Kamb could close the purchase of the Lake View Property. At
26 that time, in addition to her residence in Mt. Vernon, Washington,
27 Ms. Kamb owned real property in Burlington and in Anacortes,

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1 Washington. Ms. Kunferman denied that she had ever agreed to make
2 a loan of the Estate's funds to Ms. Kamb.

3 On May 21, 2010, Ms. Kunferman paid Ms. Kamb \$10,000 in two
4 checks drawn on the Estate's account for what she testified was a
5 "fee" for "all of the work" that Ms. Kamb was doing for her and the
6 Estate. Pl. Exs. 47, 48. Also on that day, \$375,000 of the
7 Estate's funds, including the proceeds of the sale of Mr. Herrle's
8 property to Mr. Jungquist, were paid to Land Title Company. These
9 funds were then loaned to Ms. Kamb pursuant to two promissory
10 notes, which Ms. Kamb executed in favor of the Estate on or about
11 June 2, 2010. One promissory note was in the amount of \$250,000
12 payable over 35 years with 5% interest per annum and was secured by
13 a deed of trust signed by Ms. Kamb on June 4, 2010 on the Lake View
14 Property. Pl. Ex. 17. Because Ms. Otto, the seller, had financed
15 \$100,000 of the purchase price and taken a deed of trust against
16 the Lake View Property to secure that loan (Pl. Ex. 16), there is a
17 Subordination Agreement signed on June 4, 2010, by Ms. Kunferman on
18 behalf of the Estate, subordinating the Estate's deed of trust to
19 Ms. Otto's deed of trust. Ms. Kamb executed a second promissory
20 note on behalf of the Aargh Family Limited Partnership which note
21 was in the amount of \$125,000 and payable to the Estate over 35
22 years with 5% interest per annum. The note was secured by a deed
23 of trust on the Anacortes property, which was held in the name of
24 the Aargh Family Limited Partnership, of which Ms. Kamb was the
25 general partner. See Pl. Exs. 17 and 19. The Estate's deed of
26 trust against the Anacortes Property was junior to an existing deed
27 of trust on the property.

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1 Ms. Kamb testified that before the loan closed, she explained
2 the terms of the loans to Ms. Kunferman, advised her of the risks
3 of subordination to Ms. Otto's loan, and provided information
4 concerning the rents she was receiving from her other properties.
5 She did not tell Ms. Kunferman, however, that she had been
6 suspended from the practice of law for a year and therefore would
7 not have income from that source. The loan transactions closed on
8 or about June 4, 2010. Funds in the amount of \$375,000 were
9 disbursed for Ms. Kamb's benefit as follows: \$250,000 was used to
10 fund Ms. Kamb's downpayment on her purchase of the Lake View
11 Property; closing costs related to the Lake View Property sale were
12 paid; \$14,800 in "additional disbursement" were paid, including a
13 \$7,718.19 tax debt owed by Ms. Kamb; and the balance of just under
14 \$100,000 was paid to Ms. Kamb. Pl. Ex. 52, p. 266; Pl. Ex. 42.

15 At trial, Ms. Kamb testified that it was Ms. Kunferman who
16 suggested that the Estate loan the funds to Ms. Kamb after the two
17 had discussed the need for Ms. Kamb to move from her existing
18 residence. Ms. Kamb further testified that Land Title Company
19 prepared the deeds of trust and promissory notes. To provide
20 background on the reason for transferring the funds to Land Title,
21 Ms. Kamb drafted a letter, which was addressed to Land Title
22 Company and signed by Ms. Kunferman. Def. Ex. 110. The letter
23 purports to explain why the terms of the loan were made, the actual
24 terms of the loans, that Ms. Kamb was not acting as a lawyer, and
25 that all of the paperwork pertaining to the promissory notes and
26 deeds of trust could be done through Land Title Company. The
27 letter further states that the 5% interest on the loans will
28 provide "the school" (i.e. Immaculate Conception (Regional) School)

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1 a monthly payment as Mr. Herrle wanted pursuant to his Trust.
2 Ms. Kunferman admitted that she signed the letter, but denied that
3 she typed it and she could not remember any conversations with
4 Ms. Kamb about the loans.

5 Following Ms. Kamb's execution of the promissory notes, on or
6 about June 9, 2010, contract collection agreements were prepared
7 and new accounts were created with Whidbey Island Bank to set up
8 monthly contract collection of Ms. Kamb's payments on both the
9 \$250,000 and \$125,000 promissory notes. Def. Exs. 104 and 105.
10 Ms. Kamb signed these agreements on her own behalf and
11 Ms. Kunferman signed on behalf of the Estate. Kim Raymond, a
12 representative from Whidbey Island Bank, also signed the agreement.
13 Ms. Kamb testified that these collection accounts were set up to
14 ensure that payments on the promissory notes were being made and
15 that the payments would ultimately go to the Immaculate Conception
16 (Regional) School, as the beneficiary of the Trust.

17 At trial, Ms. Kunferman verified her signature on the various
18 documents admitted into evidence, including without limitation, the
19 Acknowledgment (Def. Ex. 102), the letter to Land Title Company
20 (Def. Ex. 110), the probate documents filed with the Superior
21 Court, the sale agreement for Mr. Herrle's property, and promissory
22 notes. However, Ms. Kunferman could not remember any specific
23 details about the transactions or the contents of the documents nor
24 could she remember the circumstances under which she signed these
25 documents, except to say that she trusted Ms. Kamb and signed
26 whatever Ms. Kamb asked her to sign. She was insistent that the
27 Estate had not loaned any money to Ms. Kamb. Ms. Kunferman was 96
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1 years old at the time of trial and struggled to recall the many
2 events and transactions that occurred.

3 At some point in September 2010, Ms. Kunferman or the
4 Immaculate Conception Church became concerned about the loans to
5 Ms. Kamb and Ms. Kunferman filed a petition with the Superior Court
6 of Skagit County to remove Ms. Kamb as the trustee of the Trust on
7 October 29, 2010. The Superior Court issued an order on
8 November 22, 2010, removing Ms. Kamb as the trustee of the Trust,
9 ordering Ms. Kamb to repay all of the funds borrowed from the
10 Estate with interest, authorizing the issuance of a prejudgment
11 writ of attachment against all of Ms. Kamb's real and personal
12 property, and appointing Ms. Kunferman as the successor trustee
13 under the Trust. Pl. Ex. 24.² Pursuant to the order, the Superior
14 Court found that Ms. Kamb failed to adequately disclose to
15 Ms. Kunferman the terms and risks of the transactions, and that
16 Ms. Kamb failed to obtain Ms. Kunferman's informed consent in
17 writing to the transactions. The court did not specifically find,
18 however, that Ms. Kamb had violated a fiduciary duty to the Trust
19 or that when the Estate's funds were loaned to her, she was acting
20 as an attorney for the Estate.³ In May of 2011, at the urging of
21 the Immaculate Conception Church, Ms. Kunferman agreed to permit
22 John Lee, a member of the church's finance committee and its
23

24 ² According to Def. Ex. 101, Ms. Kamb had already resigned as
25 the Trustee in April 2010, however, it was not clear from the
26 testimony when Ms. Kunferman learned of that resignation or whether
the resignation complied with the requirements of Washington state
law.

27 ³ In fact, language stating that after Ms. Kamb was suspended
28 from the practice of law she continued to represent the Estate as
its attorney was crossed out in the court's order.

1 endowment board, to take her place as the trustee under the Trust.
2 Mr. Lee testified that Ms. Kamb made three or four payments on each
3 of the notes before she defaulted and that she currently owed the
4 Estate a total of \$350,000. He also testified that a receiver has
5 been appointed to take control of and liquidate Ms. Kamb's real
6 properties, but there was no evidence that the receiver has been
7 able to liquidate any of those properties. Nor was any competent
8 valuation testimony offered as to the properties.

9 Ms. Kamb filed a petition for relief under Chapter 7 on
10 April 1, 2011. The Court granted relief from stay to permit the
11 receiver to carry out the terms of the superior court's order on
12 June 3, 2011. Dkt. 21. Case No. 11-13856. The Estate timely
13 filed this action to except its claim against Ms. Kamb from
14 discharge.

15 III. CONCLUSIONS OF LAW

16 Based upon the foregoing findings of fact, the Court makes the
17 following conclusions of law. The plaintiff has the burden of
18 proving each element of Section 523 by a preponderance of the
19 evidence. *Grogan v. Garner*, 298 U.S. 279 (1991). Exceptions to
20 discharge are to be construed strictly against the objecting
21 creditor and liberally in favor of the debtor. *Eisen, et al. v.*
22 *Linn, (In re Linn)*, 38 B.R. 762 (9th Cir. BAP 1984).

23 A. Section 523(a)(4) - Fraud While Acting as a Fiduciary.

24 1. Fiduciary Capacity.

25 Section 523(a)(4) excepts from discharge debts that arise from
26 "fraud or defalcation while acting in a fiduciary capacity"
27 To prevail on a nondischargeability claim under Section 523(a)(4),
28 the plaintiff must prove not only the debtor's fraud or

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1 defalcation, but also that the debtor was acting in a fiduciary
2 capacity when the debtor committed the fraud or defalcation. See
3 *Teichman v. Teichman (In re Teichman)*, 774 F.2d 1395, 1398 (9th
4 Cir. 1985); and *Bugna v. McArthur (In re Bugna)*, 33 F.3d 1054, 1057
5 (9th Cir. 1994). Defalcation is defined as the misappropriation of
6 trust funds or money held in any fiduciary capacity or the failure
7 to account for such funds. *Stephens v. Bigelow (In re Bigelow)*,
8 271 B.R. 178, 186 (9th Cir. BAP 2001), citing *Lewis v. Scott (In re*
9 *Lewis)*, 97 F.3d 1182, 1186 (9th Cir. 1996). To prove fraud or
10 defalcation while acting in a fiduciary capacity, a plaintiff must
11 show that the defendant was a fiduciary to whom funds were
12 entrusted. The burden then shifts to the fiduciary to account
13 fully for all funds received for the plaintiff's benefit by
14 establishing that she complied with her fiduciary duties as to all
15 questioned transactions.

16 The broad definition of fiduciary under nonbankruptcy law - a
17 relationship involving trust, confidence, and good faith - is
18 inapplicable in the dischargeability context. *Cal-Micro, Inc. v.*
19 *Cantrell (In re Cantrell)*, 329 F.3d 1119, 1125 (9th Cir. 2003).
20 For purposes of Section 523(a)(4), the Ninth Circuit has adopted a
21 narrow definition of "fiduciary." To fit within Section 523(a)(4),
22 the fiduciary relationship must be one arising from an express or
23 technical trust that was imposed before, and without reference to,
24 the wrongdoing that caused the debt as opposed to a trust *ex*
25 *maleficio*, constructively imposed because of the act of wrongdoing

1 from which the debt arose.⁴ *Cantrell*, 329 F.3d at 1125, *citing*
2 *Lewis v. Scott (In re Lewis)*, 97 F.3d 1182, 1185 (9th Cir. 1996).
3 The meaning of "fiduciary" under Section 523(a)(4) is an issue of
4 federal law. However, courts must look to state law to determine
5 whether the requisite trust relationship exists.

6 In Washington, a fiduciary relationship arises as a matter of
7 law between an attorney and his or her client. *Liebergesell v.*
8 *Evans*, 93 Wash.2d 881, 890, 613 P.2d 1170, 1176 (1980). This
9 fiduciary relationship, however, while it meets the broad
10 definition of a fiduciary under state law, does not, without more,
11 satisfy the more narrow federal definition. *Bigelow*, 271 B.R. at
12 187. Nondischargeability based upon an attorney client
13 relationship is usually reserved for those situations where money
14 or property has been entrusted to the attorney-debtor. Thus, a
15 general fiduciary attorney-client relationship may rise to the
16 level of a fiduciary relationship for purposes of Section 523(a)(4)
17 if there are client trust funds involved. In such cases, where the
18 debt arises out of the attorney's mishandling of the client's funds
19 that are placed into a trust account the debt will be
20 nondischargeable. *Id.* at 187. See also *Banks v. Gill Distribution*
21 *Centers, Inc.*, 263 F.3d 862, 871 (9th Cir. 2001).

22 2. The Attorney-Client Relationship.

23 Under the foregoing authorities, the Court must first
24 determine whether an attorney-client relationship existed between
25

26 ⁴ "The general characteristics of an express trust are (1)
27 sufficient words to create a trust, (2) a definite subject and (3)
28 a certain and ascertained object or res." *Bigelow*, 271 at 187 (9th
Cir. BAP 2001), *citing Lovell v. Stanifer (In re Stanifer)*, 236
B.R. 709, 714 (9th Cir. BAP 1999).

1 Ms. Kamb and the Estate. Under Washington law, "The essence of the
2 attorney client relationship is whether the attorneys' advice or
3 assistance is sought and received on legal matters." *Bohn v. Cody*,
4 119 Wash.2d 357, 363, 832 P.2d 71, 75 (1992). The existence of the
5 relationship is based "largely on the client's subjective belief
6 that it exists." *In re McGlothlen*, 99 Wn.2d 515, 522, 663 P.2d
7 1330, 1334 (1983). This belief controls the issue if it is
8 reasonably based on the factual circumstances, including the
9 attorneys' words or actions. *Bohn*, 119. Wash.2d at 363. Courts
10 have held that "once established, a lawyer-client relationship does
11 not terminate easily. Something inconsistent with the continuation
12 of the relationship must transpire in order to end the
13 relationship." *Jones v. Rabanco, Ltd.*, 2006 WL 2237708 (W.D. Wash.
14 2006).

15 There is no dispute that Ms. Kamb represented Mr. Herrle, his
16 Estate and Ms. Kunferman in estate planning matters prior to
17 March 9, 2010.⁵ Ms. Kamb argues that because she was suspended
18 from practice after that date, and thus was not authorized to
19 practice law, she could not have been acting as the attorney for
20 the Estate. The Court disagrees. If she continued to provide
21 advice and assistance to the Estate with regard to legal matters,
22 albeit in contravention of state law, under the authorities cited
23 above, the Court would nonetheless find the existence of an
24 attorney-client relationship.

25

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27 ⁵In fact, there was a long history of legal representation as
28 Ms. Kamb's grandfather was an attorney for Ms. Kunferman and
Mr. Herrle, and Ms. Kamb's father was an attorney for one of
Mr. Herrle's brothers.

1 After Ms. Kamb's suspension became effective in March 2010,
2 Ms. Kunferman signed multiple documents explicitly stating that
3 Ms. Kamb was no longer practicing law, nor acting as an attorney.
4 Specifically, Ms. Kunferman signed the Acknowledgment, which states
5 clearly that any actions taken by Ms. Kamb were in her individual
6 capacity and not as a practicing attorney or any other kind of
7 professional, and she signed a letter addressed to Land Title
8 Company which reiterated the same disclaimer. Although Ms. Kamb
9 never told Ms. Kunferman that the reason she was no longer
10 practicing law was because she had been suspended, the fact remains
11 that Ms. Kamb provided written statements to Ms. Kunferman stating
12 that she would not be acting in the capacity as an attorney as of
13 March 2010.

14 Plaintiff maintains that despite these disclaimers, Ms. Kamb
15 was still its attorney because Ms. Kunferman had the subjective
16 belief that an attorney-client relationship existed between
17 Ms. Kamb and the Estate because Ms. Kamb continued to assist
18 Ms. Kunferman with the Estate's legal matters. Plaintiff argues
19 that Ms. Kamb provided legal assistance by filing the probate
20 documents with the Skagit County Superior Court on behalf of the
21 Estate. However, Ms. Kamb testified that she did not file the
22 probate documents with that court and that when the filing
23 occurred, she was on a cruise with Ms. Kunferman. Plaintiff's Ex.
24 55 suggests that the filing occurred by mail and that the mailing
25 was done by Ms. Kunferman as her personal check for the filing fee
26 accompanied the documents. Plaintiff maintains that Ms. Kamb
27 continued to represent the Estate in connection with the sale of
28 Mr. Herrle's property to Mr. Jungquist even after her suspension.

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1 Ms. Kamb testified that she had drafted the initial purchase and
2 sale agreement before Mr. Herrle's death. According to Mr. Pirkle,
3 he redrafted the agreement and his version was the final agreement
4 executed. Mr. Pirkle testified that he spoke with Ms. Kamb about
5 the sale around April 8, 2010. Ms. Kamb was on a cruise, however,
6 and testified that she did not speak to Mr. Pirkle at that time.

7 Plaintiff argues that Ms. Kunferman's belief that Ms. Kamb
8 continued to act as the Estate's attorney is evidenced by the
9 Estate's check in the amount of \$10,000 paid to Ms. Kamb in May of
10 2010 for what Ms. Kunferman testified was the work that Ms. Kamb
11 had been doing. Pl. Ex. 42. The check, however, indicates that it
12 was paid in connection with Ms. Kamb's purchase of the Lake View
13 Property and does not recite that it is a payment for legal
14 services. Plaintiff also argues that Ms. Kamb drafted the deeds of
15 trust, promissory notes and subordination agreement she signed in
16 connection with the loans given to the Estate. The testimony at
17 trial, however, showed that it was in fact Land Title Company which
18 provided these documents. Moreover, if Ms. Kamb had drafted these
19 documents, that alone, would not prove that an attorney-client
20 relationship existed. An attorney-client relationship is not
21 created merely because an attorney prepares documents formalizing a
22 transaction that affects an individual. *Bohn*, 119 Wash.2d at 364.
23 Finally, Plaintiff points out that Ms. Kamb prepared an inventory
24 of assets for the Estate and did so as its attorney because
25 preparation of this type of document was the kind of estate
26 planning work she would typically have done for her clients.
27 Ms. Kamb conceded that she did prepare the inventory, but argues
28 that she did it as a friend to Ms. Kunferman. While it is not

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1 entirely clear in what capacity Ms. Kamb was acting when she
2 drafted the inventory, this inventory cannot be the sole basis for
3 concluding that Ms. Kamb was acting as an attorney during the
4 relevant period of time.⁶

5 From the totality of the evidence, the Court is not persuaded
6 that Ms. Kamb continued to provide legal advice to the Estate after
7 her suspension. Additionally, it is important to note that there
8 is no evidence showing that Ms. Kunferman sought legal advice from
9 Ms. Kamb pertaining to the specific loan transactions that are the
10 basis for the Plaintiff's claim. It was apparent from the
11 testimony that Ms. Kunferman trusted Ms. Kamb and that they were
12 close personal friends. Their families had known each other for
13 years. But, the existence of a trusting relationship is not
14 tantamount to an attorney-client relationship. Thus, the Court
15 cannot find that an attorney-client relationship existed between
16 Ms. Kamb and the Estate at the time the loans by the Estate to
17 Ms. Kamb were made.

18 3. The Existence of a Trust.

19 Alternatively, even if an attorney-client relationship existed
20 between the Estate and Ms. Kamb at the time the debt was incurred,
21 Plaintiff failed to show the existence of the kind of trust
22 required under Section 523(a)(4). Under Section 523(a)(4), the
23 debtor must have been a trustee in the strict or narrow sense
24 pursuant to an express or technical trust.

25 In this case, there was no express or technical trust under

26
27 ⁶ The Court agrees with Plaintiff that this inventory was
28 prepared at or around the time the loan transactions occurred
because the inventory describes the two promissory notes that
Ms. Kamb executed in favor of the Estate.

1 which Ms. Kamb was acting as a trustee. Ms. Kamb had no express
2 obligation to keep the funds loaned to her separate from her own
3 money, or to hold the funds in trust for the Estate. The Estate
4 loaned the funds to Ms. Kamb so that Ms. Kamb could purchase real
5 property, which she did. There were no restrictions placed on how
6 the loan proceeds were to be used by Ms. Kamb, other than the
7 obligation to pay interest and to return the principal pursuant to
8 the terms of the notes.

9 Plaintiff relies on *Banks v. Gill Distribution Centers* in
10 support of its contention that when a client's funds are involved,
11 an attorney becomes a fiduciary with regard to those funds under
12 Section 523(a)(4). In *Banks*, however, client funds from a
13 settlement were deposited into the defendant-attorney's trust
14 account. The court held that once the attorney placed his client's
15 funds into his trust account, those funds became a trust *res* and he
16 became his client's fiduciary for purposes of section 523(a)(4).
17 *Banks*, 263 F.3d at 871.

18 The funds loaned by the Estate to Ms. Kamb were not deposited
19 into her trust account or paid to her to be held in trust for the
20 Estate. There was no evidence of an intent to create a trust nor
21 were any trust-like duties imposed on Ms. Kamb. Instead, the
22 evidence proved that Ms. Kunferman was seeking to make an
23 investment of the funds on behalf of the Estate. It may not
24 ultimately have been a wise investment of the funds, but the Court
25 finds it was not a transaction in which Ms. Kamb was a fiduciary
26 within the meaning of Section 523(a)(4).

27 Whether Ms. Kamb's borrowing of funds from the Estate was a
28 violation of her duties under the Washington's Rules of

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1 Professional Conduct is not the question here. In the absence of
2 any requirement to segregate the funds obtained or otherwise
3 provide that the funds were to be held in trust, this court can
4 only conclude that the arrangement between Ms. Kamb and the Estate
5 was no more than that of debtor and creditor.

6 Because Ms. Kamb was not acting in a fiduciary capacity for
7 purposes of Section 523(a)(4), the Plaintiff is not entitled to a
8 judgment of nondischargeability under that section.⁷

9 **B. Section 523(a)(6) - Conversion, Malicious Injury.**

10 Plaintiff also contends that the debt is nondischargeable
11 under Section 523(a)(6). Proof of a cause of action under Section
12 523(a)(6) requires a two step process. First, plaintiff must prove
13 that Defendant committed a "willful" injury. *Khaligh v. Hadaegh*
14 (*In re Khaligh*), 338 B.R. 817, 831 (9th Cir. BAP 2006). To satisfy
15 the willfulness element, a creditor must prove that the debtor
16 deliberately or intentionally injured the creditor, and that in
17 doing so, the debtor intended not just to commit the act itself,
18 but also intended the consequences of the act. See *Kawaauhau v.*
19 *Geiger*, 523 U.S. 57, 61-62 (1998). Further, the Court must apply a
20 subjective test in determining the debtor's intent. "[Section]
21 523(a)(6) renders a debt nondischargeable when there is either a
22 subjective intent to harm, or a subjective belief that harm is
23 substantially certain." *Carillo v. Su (In re Su)*, 290 F.3d 1140,
24 1144 (9th Cir. 2002).

25
26 ⁷ It should be noted that at no time was Ms. Kamb ever the
27 personal representative under any of Mr. Herrle's wills. Instead,
28 her fiduciary duty was as the trustee under the Trust until she
resigned from that duty. Plaintiff never argued that the proceeds
of the sale of Mr. Herrle's house and farm belonged to the Trust
nor is the Trust a plaintiff in this action.

1 The second step in the Section 523(a)(6) analysis is to
2 determine whether the debtor's conduct was "malicious." *Kaligh*,
3 338 B.R. at 831. In order to be found malicious, the debtor must
4 have committed a (1) wrongful act, (2) done intentionally,
5 (3) which necessarily causes injury, and (4) which is done without
6 just cause or excuse. *Id.* The last element, whether the act was
7 done without just cause or excuse, presents a mixed question of law
8 and fact. *Jett v. Sicroff (In re Sicroff)*, 401 F.3d 1101, 1105-06
9 (9th Cir. 2005), *cert. denied* 125 S.Ct. 2964 (2005). Evidence of
10 specific intent to injure can negate just cause or excuse.
11 *Khaligh*, 338 B.R. at 831.

12 Plaintiff argues that Ms. Kamb's conduct was willful and
13 malicious and her debt to the Estate should not be discharged.
14 Specifically, Plaintiff asserts that malice is shown by Ms. Kamb's
15 manipulation of Ms. Kunferman, an elderly woman, to use the
16 Estate's funds to make a loan to Ms. Kamb. Despite these
17 assertions, however, Plaintiff failed to convince the Court that
18 such manipulation actually occurred or that Ms. Kamb intended to
19 harm the Estate. Third parties at Whidbey Island Bank and Land
20 Title were involved and familiar with many of the transactions that
21 took place during the relevant time period, yet none were called to
22 testify that Ms. Kunferman was incompetent at the time the Estate
23 loaned funds to Ms. Kamb. And, although Ms. Kunferman had trouble
24 remembering events when she testified, the Court did not find her
25 lacking in mental competence.

26 Finally, Plaintiff failed to quantify its injury. The
27 Plaintiff has relief from stay to foreclose its interest in the
28 properties securing the promissory notes. There was no evidence

1 presented that there will not be sufficient collateral ultimately
2 to cover the debt.

3 Accordingly, I conclude that Plaintiff has not met its burden
4 of showing the debt nondischargeable under Section 523(a)(6).

5 **CONCLUSION**

6 For the reasons stated, the Court finds that Plaintiff has not
7 proved a case under either Section 523(a)(4) or (a)(6), therefore
8 the debts which are the subject of these proceedings are
9 dischargeable in bankruptcy. Defendant may present an Order and
10 Judgment in accordance with this decision.

11 Dated as of the Entered on Docket date above.

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Hon. Karen A. Overstreet
United States Bankruptcy Judge
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